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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SORIN POPESCU,

Plaintiff and Respondent,

v.

KEYES EUROPEAN, LLC, et al.,

Defendants and Appellants.

B207968

(Los Angeles County  
Super. Ct. No. BC381861)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Maureen Duffy-Lewis, Judge. Reversed and remanded.

Fisher & Phillips, Christopher C. Hoffman, Amy L. Lessa, and Megan C.  
Winter for Defendants and Appellants.

Kokozian & Nourmand and Michael Nourmand for Plaintiff and  
Respondent.

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## ***INTRODUCTION***

Plaintiff, Sorin Popescu (“Popescu”), brought suit in the Los Angeles County Superior Court alleging causes of action arising from Popescu’s employment with defendants, Keyes European, LLC and Hak, Incorporated (“Keyes”). The allegations gave rise to a claim by Keyes that the matter should be arbitrated in accordance with two pre-litigation arbitration agreements signed by the parties. Keyes filed appropriate motions in the Los Angeles County Superior Court to have the matter arbitrated. On April 21, 2008, the trial court heard and denied Keyes’ petition to arbitrate as set forth in a rather short minute order which declared that the arbitration agreements were unenforceable based on a finding of unconscionability, both procedurally and substantively. This appeal followed by Keyes pursuant to Code of Civil Procedure<sup>1</sup> section 1294. For the reasons hereafter given, the judgment of the trial court is reversed.

## ***FACTUAL AND PROCEDURAL SYNOPSIS***

Keyes operates a retail automobile dealership located in Los Angeles County. Popescu was employed by Keyes from September 2005 until November 7, 2007. Five of Popescu’s claims are premised on violations of the Labor Code and one is based on unfair competition under the Business & Professions Code. Specifically, Popescu alleges that he was denied overtime pay, meal and rest periods and improper payment at the time of his termination by Keyes. Popescu also alleges Keyes failed to provide an itemized wage statement showing deductions and an accurate report of hours worked to its employees.

### ***The pre-employment arbitration agreements.***

On August 26, 2005, Popescu signed the arbitration agreement entitled “Applicant’s Statement & Agreement.” On September 19, 2005, he signed a second

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<sup>1</sup> Unless otherwise stated, all future statutory references are to the Code of Civil Procedure.

arbitration agreement entitled “Employee Acknowledgment and Agreement.” A reading of the agreements finds them to be substantially similar. There is no dispute on appeal as to the authenticity of Popescu’s signatures on the agreements and Popescu never made Keyes aware of any questions or concerns Popescu might have had at the time he signed the agreements.

***Relevant terms of the agreements.***

The agreement signed by Popescu on August 25, 2005, provides in relevant part:

“I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. . . . both the Dealership and I agree that any claim, dispute and/or controversy . . . that either I or the Dealership . . . may have against the other which would otherwise require or allow resort to any court or other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Dealership, whether based on tort, contract, statutory, or equitable law, or otherwise . . . shall be submitted to and determined exclusively by binding arbitration . . . . I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act . . . . However, in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court, to the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right to demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to notions of ‘just cause’) other than such controlling law. . . . Awards shall include the arbitrator’s written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case

law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2.

“I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY.”

The second agreement Popescu signed on September 19, 2005, mirrors the agreement and specifically states:

“Should any terms or provision, or portion thereof, be declared void or unenforceable it shall be severed and the remainder of this agreement shall be enforceable.”

***Popescu’s civil complaint.***

As previously indicated, on December 6, 2007, Popescu filed his complaint in the Los Angeles County Superior Court alleging six causes of action, also previously described in this opinion.

***Keyes’s motion to compel arbitration.***

On January 16, 2008, in lieu of answering the complaint, Keyes filed a “Motion to Compel Arbitration and to Stay the Proceedings. In support of its motion Keyes filed a memorandum of points and authorities and a declaration from an individual involved in the human resources function at Keyes.

The trial court denied Keyes’s motion because it believed the agreements failed to comply with applicable law and were procedurally and substantively unconscionable.

Keyes filed a timely notice of appeal.

## ***DISCUSSION***

***Applicable law.***

Before beginning a discussion of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, *infra*, a seminal California Supreme Court decision, we first address Popescu’s contention pertaining to Labor Code section 229 which he contends bars arbitration of the instant dispute in California. Popescu is correct in his

claim that it is undisputed that the subject arbitration agreements select California law and procedure as the choice of law agreed upon by the parties. But it is further undisputed that the agreements in this case explicitly provide that “. . . the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act . . . .” This court is very sensitive to the term “controlled” by the Federal Arbitration Act (FAA). The language utilized in the agreement is conspicuous. The language is also clear that the intended right of arbitration is to be in conformity with the “procedures” of the California Arbitration Act (CAA). The question presented is whether the Federal Arbitration Act preempts the provisions of section 229 of the California Labor Code and we conclude that it does. The question of preemption turns on whether the activity in question in this case involves interstate commerce thereby giving preemptive status to the Federal Arbitration Act. Popescu argues that the business in question only operates within the County of Los Angeles and the putative class members only worked on vehicles that were submitted to the dealership located in Los Angeles County for customers that resided in Los Angeles County. Keyes counters this argument by pointing out that Keyes conducts vehicle trades with other dealerships outside of California, participates in national advertising, purchases parts from businesses outside of California, sells vehicles to customers outside of California and has an internet website that is accessible nationally. Keyes comes to the conclusion that the Agreements undoubtedly affect commerce and are governed by the FAA. This court comes to the same conclusion.

This brings us to draw a distinction between the FAA and the CAA. Under the FAA, it is well established that federal preemption of state statutes is intended where those statutes attempt to limit arbitration and provide a judicial forum where arbitration was the declared policy under the FAA. Section 229 of the Labor Code is such a statute. Keyes, in its reply brief, states “The United States Supreme Court reviewed Labor Code section 229 and decided this exact issue in *Perry v. Thomas* (1987) 482 U.S. 483, 107 S.Ct. 2520. In *Perry*, the Court’s inquiry was whether Section 2 of the FAA, which mandates enforcement of arbitration agreements, preempts California Labor Code section

229. *Id.* at 484. The Court held that the FAA preempts states' legislative attempts to require a judicial forum for the resolution of claims that the parties agreed to arbitrate. *Id.* at 489. Thus, the Court held that the FAA preempts Labor Code section 229 and mandates enforcement of parties' agreements to arbitrate state law wage claims. *Id.* at 491."

We conclude that the right to arbitrate the underlying dispute should have been granted, but we also note that the parties were free to agree upon the procedures to be utilized in arbitrating the matter. They chose the procedures under the California Arbitration Act, which was permissible and proper so long as the underlying right to arbitrate the dispute was preserved in accordance with the FAA. We do not discern that the procedures chosen under the CAA ran afoul of the proscriptions contained in the FAA. We now turn our attention to the teaching provided by the California Supreme Court in *Armendariz*.

Any case involving an employee/employer dispute requiring arbitration must begin with a careful reading of the seminal California Supreme Court decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th 83. In this seminal decision, our high court explained in great detail the requirements that must be satisfied before a pre-employment arbitration provision is valid and enforceable. The decision is detailed and quite clear regarding the requirements to be met in arbitrating anti-discrimination lawsuits brought against an employer. The decision specifically sets forth the policy established in California statutory and decisional law that arbitration is a viable and equitable means of resolving disputes, including employment disputes. The decision does not waiver from the principle that there is a strong and consistent policy of enforcing pre-dispute arbitration under both California and Federal law. With these concepts fully embraced in *Armendariz*, we now enumerate with more particularity the annunciated five safeguard principles set forth in *Armendariz*.

1. The agreement must provide for adequate discovery;
2. The agreement must be interpreted to mean that a written decision be issued by the arbitrator at the conclusion of the arbitration;
3. The agreement must not put any limitations on the types of damages or relief available to the employee if the matter were in a judicial forum;
4. The agreement must be interpreted so the employer must pay for the cost and arbitrator's fees unique to the arbitral forum; and
5. The agreement must provide for the selection of a neutral arbitrator.

We now apply this template to the agreements in issue on this appeal to see if they pass muster under *Armendariz*.

***Discovery.***

The agreements do not purport to curtail Popescu's right to conduct discovery in any respect. In fact the agreements signed by him go to some length to preserve those rights should a dispute arise between Keyes and Popescu which is covered by the arbitration agreement. The agreement provides in relevant part as follows: ". . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to *discovery*).” (Emphasis added.) Nothing in the Federal Arbitration Act or the California Arbitration Act, or in the signed agreement purport to curtail Popescu's discovery rights in any respect. The claim has no merit and we so hold. This provision fully complies with the dictates of our high court in *Armendariz*.

***Written decision of arbitrator required.***

The agreements state: “. . . Awards shall include the arbitrator's *written* reasoned opinion and, at either party's written request within 10 days after issuance of the award, shall be subject to affirmation, reversal or modification, following review of the record and arguments of the parties by a second arbitrator . . . .” (Italics added.)

The *Armendariz* court expressly noted that the agreement to arbitrate must require a written decision, which this agreement surely does. Even if the agreement was devoid of such a provision, it would be implied according to the court in *Armendariz*. There is no need to resort to such an implied provision in this instance. This requirement of our high court is fully complied with in this instance.

***Limitations on the types of damages or relief to employee in a judicial forum.***

One of the reasons our high court refused to enforce the arbitration agreement in *Armendariz* stemmed from the fact that available remedies and damages were capped to the disadvantage of the employee. In drafting the agreements in this case, the drafter was careful to avoid this entanglement which would have led to a violation of an element forbidden by the *Armendariz* court. In *Armendariz* the agreement limited the ex-employee from recovering attorneys' fees and punitive damages, as well as precluding lost wages from the time of discharge until the time of the arbitration award.

We search the agreements involved in this appeal for any suggestion of a limitation on damages available which would violate *Armendariz*. We find none. Indeed, we find no suggestion at all pertaining to damages. Apparently, it is within the purview of the arbitrator to award such damages as are just and equitable in the premises. This is a far cry from violating *Armendariz*. The claim is meritless.

***Silence as to costs and apportionment of arbitrator's fees.***

Popescu next asserts the arbitration agreements should not be enforced for the reason that the question of costs and arbitrator's fees apportionment are not covered in the agreement and it would be unconscionable for him to bear a portion of the expense of such fees and costs. We find this position to be unsustainable under *Armendariz*. The *Armendariz* court specifically held that "the absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement." (See *Armendariz*, *supra*, 24 Cal.4th at p. 113.) This principle was revisited and confirmed in *Little v. Auto Stiegler* (2003) 29 Cal.4th 1064, 1068-1069. In addition, the *Armendariz* court found that the arbitration agreement's incorporation of the California Arbitration Act, which contains a fee splitting provision, did not render the

arbitration agreement unenforceable. (See § 1284.2.)<sup>2</sup> Rather, the *Armendariz* court held that the provisions of the FEHA imposed a specific obligation on defendants that overrode the general fee-shifting scheme established by the California Legislature in the California Arbitration Act. It thus follows that the agreements in this instance which incorporate the procedures of the California Arbitration Act do not bar enforcement of the agreements.

Further, the agreement specifically states that controlling case law on the issue of costs will apply. The agreement dated August 26, 2005, specifically states that “[i]f CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions of controlling case law instead of CCP § 1284.2.”

We find no violation of the *Armendariz* safeguards on this issue.

***Provision for selection of a neutral arbitrator.***

Thus we now visit the final *Armendariz* safeguard. It is not a laborious task. The agreement provides: “. . . However in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. . . .” This safeguard in the agreement virtually insures that the arbitrator will undoubtedly be neutral in all respects and we so hold.

Appellant has raised the issue of severance of any offending provisions of the agreements and enforcement of the remainder of the agreements. We see no reason to consider this issue in view of the fact that we find the agreements fully enforceable under *Armendariz*.

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<sup>2</sup> Section 1284.2 provides: “Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.”

Before coming to the disposition in this case, it is perhaps prudent, and more than likely an effort in overkill, to revisit that portion of *Armendariz* where our high court cautions that when both procedural and substantive unconscionability are present in an agreement, the court must assess them on a sliding scale in order to determine whether their presence renders an arbitration agreement unenforceable. (*Armendariz, supra*, 24 Cal.4th at p. 114.) Thus, for example, an arbitration agreement with a small degree of procedural unconscionability must have terms with a high degree of substantive unconscionability in order for the court to refuse to enforce the agreement. Our high court reminds us that procedural unconscionability is present when there is a large disparity in the bargaining positions of the parties or where the agreement is one of adhesion. On the other hand, substantive unconscionability is present in an agreement where the actual terms of the agreement are overly harsh or one-sided. In *24 Hour Fitness, Inc. v. Superior Court* (1988) 66 Cal.App.4th 1199, 1213, the court defined the substantive element as one which involves “contract terms that are so one-sided as to ‘shock the conscience’ or impose harsh or oppressive terms.” We find no such terms in these agreements.

In concluding, we find that the agreements in this instance fully comply with the safeguards established by our high court in its decisions in *Armendariz* and *Little*. The trial court erred in finding the agreements for arbitration unenforceable on the grounds of procedural and substantive unconscionability and we so hold.

### ***DISPOSITION***

The judgment of the trial court is reversed with instructions to vacate its decision denying appellants’ motion to compel arbitration and to enter a new order granting

appellants' motion for order of court for arbitration. Appellants are entitled to costs of appeal.

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**WOODS, J.**

**We concur:**

**PERLUSS, P.J.**

**ZELON, J.**